

ICTR-01-76-1
26-01-2004
(870-866)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse
Judge Jai Ram Reddy
Judge Sergey Alekseevich Egorov

Registrar: Adama Dieng

Date: 26 January 2004

THE PROSECUTOR

v

Aloys SIMBA

Case No.: ICTR-01-76-I

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**DECISION ON THE DEFENCE MOTION TO RELEASE ALOYS SIMBA PURSUANT
TO RULES 40bis (H) and 40bis (K)**

Office of the Prosecutor

Richard Karegyesa
William T. Egbe
Sulaiman Khan
Amina Ibrahim

The Defence

Sadikou Ayo Alao
Suleiman Khan

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergey Alekseevich Egorov (“the Chamber”);

BEING SEIZED OF the Defence “Requête...en vue de déclarer la détention de l’accusé Aloys Simba, arbitraire et pour demander sa mise en liberté subséquente (article 40bis (H), 40bis (K) du RPP)”, filed on 31 October 2002;

CONSIDERING the Prosecution “Response to the Defence Motion Alleging Arbitrary Detention and Seeking Release”, etc., filed on 5 December 2002; the Defence “Réplique de la défense à la réponse du procureur suite à la requête de la défense”, etc., filed on 2 January 2003; and the Registrar’s “Mémoire du greffier relativement à la requête de la défense”, etc., filed on 10 January 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 23 November 2001, after hearing *in camera* submissions from the Prosecution, Judge Andresia Vaz ordered the “immediate transfer of the suspect Aloys Simba” to the Tribunal’s Detention Facility in Arusha, and his provisional detention there “for a period of not more than 30 days from the day after the transfer.”¹ The order also requested the assistance of the Government of Senegal in giving effect to the order, and to “hold Aloys Simba in custody until he is handed over to the Tribunal”.

2. On 27 November 2001, Simba was arrested and detained by the Senegalese Government. He challenged the validity of his prospective transfer and arrest before the courts of Senegal, although the date on which this legal challenge was initiated is not apparent from the parties’ submissions. While still in detention in Senegal, an Indictment against Simba was confirmed by Judge Winston C. Maqutu on 8 January 2002. Two days later, a Senegalese court rejected Simba’s legal challenge, and on 16 February 2002, the Senegalese Head of State authorized his transfer to the Tribunal. On 9 March 2002, Simba was remanded into the custody of Tribunal officials who served him with the Indictment. He arrived in Arusha on 11 March 2002, after an overnight stop of some 24 hours in Mali where another person was taken into custody by Tribunal officials, and made his initial appearance before the Tribunal on 18 March 2002.

SUBMISSIONS

3. The Defence argues that the Order on its face contravenes Rule 40bis (D) as it does not contain an initial time limit for provisional detention and that, in any event, the Accused was provisionally detained for a period greater than that permitted under Rule 40bis. The Accused was in the “constructive custody” of the Tribunal as soon as he was arrested in Senegal and the period of provisional detention must be imputed to the Tribunal as of that date. Further, the

¹ *Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-DP, Order for Transfer and Provisional Detention, 23 November 2001.

Defence implies that the provisional detention of Simba did not come to an end upon the confirmation of an Indictment against him, as service was only effected on 9 March 2003. During the Accused's provisional detention, the Prosecution did not request periods of extension as required under Rule 40*bis* (F) and (G). Legal proceedings initiated by the Accused in Senegal do not excuse the Prosecution's obligation to comply with the time-limits set out in Rule 40*bis*. The violations of Rule 40*bis* render the continued detention of the Accused illegal and deprives the Tribunal of jurisdiction.

4. The Prosecution responds that the arrest, transfer, and detention of the Accused did not violate any provisions of the Rules. First, the order does contain a time limit of thirty days and is therefore not deficient on its face. Second, the period of provisional detention did not violate Rule 40*bis*, which commences only on the day after the suspect's transfer to the Tribunal's detention facility. The period of detention in the requested State is attributable to that State, not the Tribunal. Any delay between the Accused's arrest and transfer was not the result of negligence by the Prosecution, but rather to the legal proceedings commenced at the Accused's own initiative in the courts of Senegal. The Prosecutor also argues that upon confirmation of the Indictment on 8 January 2002, Aloys Simba was no longer a suspect to whom Rule 40*bis* applies, but rather an Accused as defined by Rules 2 and 47(H)(ii). Even assuming that the period of detention was illegal, the Tribunal's jurisdiction *rationae personae* should not be affected.

DELIBERATIONS

5. The portions of Rule 40*bis* most pertinent to this motion are as follows:

(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.

(D) ...The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rule 42 and 43.

6. The Chamber rejects the argument that the Order was facially deficient for failing to specify an initial time limit. Section II of the Order, mirroring the language of Rule 40*bis* (C), authorizes the suspect to be "provisionally detained...for a period of not more than 30 days from the day after the transfer to the Tribunal's Detention Facility".²

7. The time limits for provisional detention set forth in Rule 40*bis* (C) commence only "from the day after the transfer of the suspect to the detention unit of the Tribunal". Nevertheless, the Appeals Chamber has held that there may be occasions when a person, arrested by a State at the request of the Tribunal, is deemed to be within the "constructive custody" of the Tribunal for the purposes of calculating the time-limits set out in Rule 40*bis*. The conditions for imputing constructive custody to the Tribunal, as set forth by the Appeals Chamber, are that: (a) the suspect, but for the request by the Prosecution or the Tribunal, would not be in the State's

² *Ibid.*

custody; and (b) that the State was willing to transfer the suspect at the relevant time.³ The Appeals Chamber specifically considered whether the doctrine of constructive custody would apply to a suspect who challenged his or her detention before the courts of the State, making reference to the case of *Ntakirutimana*:

...Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant.⁴

The Defence's argument that the time-periods of Rule 40bis must apply notwithstanding any procedures undertaken by the suspect in the State of detention is contrary to this clear direction from the Appeals Chamber. Nor would it be logical, as any proceedings before State courts regarding a detained suspect which lasted more than ninety days would automatically trigger a violation of Rule 40bis, notwithstanding the lack of any control over those proceedings by the Tribunal.

8. The Defence has failed to establish that the Government of Cameroon was prepared to transfer Aloys Simba to the Tribunal as required for the application of the doctrine of constructive custody. Accordingly, the plain meaning of Rule 40bis (C), that the thirty day time-limit commences on "the day after the transfer to the suspect to the detention unit of the Tribunal", must apply. Having reached this conclusion, and in the absence of fuller submissions from the parties, the Chamber sees no reason to consider the date upon which Aloys Simba became an Accused.

³ *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (AC), 4 November 1999, paras. 54-61.

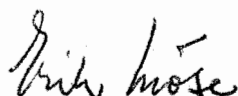
⁴ *Ibid.* para. 59. The finding that the suspect was in the constructive custody of the Tribunal was subsequently reviewed by the Appeals Chamber after submissions by the Prosecution showing that Cameroon was not, in fact, prepared to transfer the suspect at the relevant time. During that period, the suspect was held not to be in the constructive custody of the Tribunal. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, paras. 56-58.

9. The Prosecution argues that the motion is frivolous and has requested that Defence costs associated with the motion be denied. Though recognizing that the Defence motion verges on the frivolous, the Chamber declines, on this occasion, to exercise its discretion to impose sanctions.

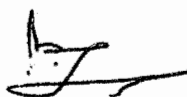
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 26 January 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergey Alekseevich Egorov
Judge

[Seal of the Tribunal]

